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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Limitations on Commercial Time on Television Broadcast Stations	)	MM Docket No. 93-254

STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE
COMMENTS OF SILVER KING COMMUNICATIONS, INC.

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SUMMARY

These comments address the constitutionality of any re-imposition of limitations on commercial programming by, in particular, home shopping service broadcasters. Recent Supreme Court authority indicates that the government cannot regulate commercial speech as readily as it could in an earlier era. As the Commission recognized in its Notice of Inquiry, just last term, the Supreme Court admonished regulators not to place too much emphasis on any perceived distinction between commercial and noncommercial speech.

Even assuming home shopping service programming is primarily "commercial," however, it cannot be restricted consistent with the First Amendment absent a showing of real harm caused by the speech. No commercial harm caused by home shopping service programming has been identified. Indeed, to the contrary, the Commission itself found in the proceeding on whether home shopping service stations are entitled to must-carry status under the Cable Act, that home shopping service broadcasters serve the public interest, provide a public service to those unable to purchase goods in a more traditional manner, and have no detrimental effect on the public. The underlying impetus for this proceeding, the disdain for home shopping service programming by certain members of Congress and other home shopping detractors, simply does not provide a constitutional basis for restricting speech.

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STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE COMMENTS OF SILVER KING COMMUNICATIONS, INC.

On behalf of Silver King Communications, Inc. ("SKC"),[1] I am submitting this statement in response to the Commission's Notice of Inquiry in the above-captioned proceeding.[2]

I. INTRODUCTION

A. Qualifications

I am the Arthur B. Hanson Professor of Law, and the Director of the Institute of Bill of Rights Law, at the College of William and Mary, Marshall-Wythe School of Law. I write and speak extensively on constitutional law issues, particularly on First Amendment matters. My most recent book, Free Speech in an Open Society, was published in April 1992 by Alfred A. Knopf. My other books include: Suing the Press: Libel, the Media, & Power (Oxford University Press 1986) (which received the ABA Gavel Award Certificate of Merit in 1987); Law of Defamation (Clark, Boardman Publishing Co. 1986), a legal treatise; Jerry Falwell v. Larry Flynt: The First Amendment on Trial, (St. Martin's Press 1988; paperback edition by University of Illinois Press); and Constitutional Law: Structure and Rights in Our Federal System (co-authored with Professors Daan Braverman

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1/ SKC is the parent of the licensees of twelve television stations, all of which have a home shopping entertainment format and are affiliated with the Home Shopping Network, Inc.

2/ Notice of Inquiry, MM Docket No. 93-254, 7 FCC Rcd 7277 (1993) (hereinafter "Notice").

and William Banks) (Matthew Bender & Co. 1991), a law school casebook.

B. Background

On July 19, 1993, the Commission found that television stations that are predominately utilized for the transmission of sales presentations or program length commercials ("home shopping service broadcasters") cause no discernable harm to the public and, in fact, serve the public interest.[3/] Despite this unequivocal finding, the Commission initiated this proceeding to determine "whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations," particularly home shopping service broadcasters.[4/] This inquiry appears to have been prompted, in part, by "congressional debates on the 1992 Cable Act [which] reflected a . . . generalized concern with the issue of commercialism in broadcasting."[5/] This context is telling.

3/ Report and Order in the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5321, 5326, 5328 (1993), petition for reh'g pending (hereinafter "Report and Order").

4/ Notice at 1. This raises the preliminary question whether home shopping service stations, which as Chairman Quello recognized "provid[e] a home shopping service," see Report and Order, 8 FCC Rcd at 5335 (separate statement of Chairman Quello), are properly viewed as broadcasting "commercial" programming in the traditional sense.

5/ Notice at 2.

In 1992, various legislators sought to amend the must-carry provisions of the proposed Cable Act to deny home shopping service broadcasters the mandatory cable carriage afforded other similarly situated over-the-air broadcasters.[6/] The primary proponent of the Senate amendment was Senator John B. Breaux. Senator Breaux never sought to conceal the disdain for home shopping service broadcasters that motivated his proposed amendment:

> [T]he FCC has really dropped the ball in allowing at least 100 UHF stations to become "broadcast stations" when in fact they do not meet the public interest test of the Communications Act of 1934 . . . . I do not think the FCC should have allowed [any home shopping format station] to become a broadcast station under the meaning of the Act . . . . Home Shoppers [sic] Network, which has acquired all of these broadcast stations, I would submit is not meeting these public interest tests, and as a result should not have the benefit of

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6/ The House version of the bill included a similar provision:

> (f) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS. -- Nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or videoprogramming service that is predominately utilized for the transmission of sales presentations or program length commercials.

H.R. 4850, 102d Cong., 2d Sess. § 614(f) (1992).

being a must carry with regard to cable operators.[7]

Although Congress rejected the Breaux Amendment and its restrictive concepts, the compromise position ultimately approved by both houses of Congress as Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992[8] nevertheless subjected home shopping service broadcasters to a burden imposed on no other broadcaster. In particular, Section 4(g) required the Commission to conduct an extraordinary proceeding to determine whether home shopping service broadcasters as a class are serving the public interest, convenience and necessity. Congress required the Commission to undertake this unprecedented proceeding notwithstanding that the Commission previously had granted and renewed licenses to scores of home shopping format broadcasters based on individualized determinations that those broadcasters were, in fact, serving the public interest, convenience and necessity. Only if the Commission once again determined that such stations were operating in the public interest, convenience and necessity, would they be eligible for mandatory cable carriage. Congress made no attempt to hide

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7/ Executive Session: Mark-Up Hearings on S-12 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 102d Cong., 1st Sess. 20-22 (May 14, 1991).

8/ Pub. L. No. 102-385, 106 Stat. 1460, 1475 (1992) ("the Cable Act").

the fact that this extraordinary burden was being imposed on home shopping service broadcasters not because they had caused any identifiable harm to the public but solely because of a paternalistic dislike of their programming format.

During the Commission's congressionally-compelled re-evaluation of the home shopping service industry, hundreds of commenters submitted both formal and informal comments attesting to the public service performed by home shopping service broadcasters. Based on the substantial record before it, the Commission concluded that home shopping service stations are operating in the public interest, convenience and necessity. Equally important for purposes of this inquiry, the Commission specifically found that the extensive record before it "reflects no detriment to the public caused by the [] existing program operations" of home shopping format broadcasters.[9/] Accordingly, the Commission qualified home shopping service stations for mandatory cable carriage pursuant to section 4(g) of the Cable Act.[10/]

9/ Report and Order, 8 FCC Rcd at 5328.

10/ Because the Commission concluded that home shopping service broadcasters are serving the public interest, it did not have to decide whether the Constitution would permit the Commission to deny a broadcaster a benefit based exclusively on the content of its programming. However, the Commission did recognize that "the failure to qualify certain licensed stations [for must-carry status] based upon their programming decisions would place the content neutrality of

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In a separate statement concurring in the decision, Chairman Quello, recognizing the "strong sentiment" of some members of Congress that home shopping service broadcasters "are inconsistent with the overall public interest mandate of the Communications Act," expressed his belief that "it would be appropriate for the Commission to initiate a more general reexamination of the issue of commercialism as it relates to the public interest."[11/] In doing so, the Chairman stressed the forward-looking nature of the public interest inquiry and hinted at the paternalistic bias that underlies criticism of home shopping services:

> But I think this proceeding implicates a broader public interest question that goes to the heart of the future of broadcasting. We are constantly told of the brave new electronic future in which an array of services will be available on call directly to consumers. They include home shopping, home banking, pay-per-view events and a host of other interactive services.
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> People probably are not thinking about what has been called the "electronic superhighway" when they joke about Ginsu knives and cubic zirconium jewelry. And while the products being sold at the moment on some channels may attract ridicule in some quarters, it is evident that home shopping services are a precursor to this promising future in

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10/ (...continued)
the must-carry rules into serious doubt, thereby jeopardizing their constitutionality." Report and Order, 8 FCC Rcd at 5329.

11/ Id. (separate statement of Chairman Quello).

> which consumers may use their TVs for more than just passive viewing.
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> In this regard, there may be an important distinction between the issue of "commercialism," raised by some commenters, and that of providing a home shopping service.[12/]

Two months later, the Commission instituted this proceeding to determine "whether the public interest would be served by reestablishing limits on the amount of commercial matter that a television station can broadcast."[13/] As the Comments of Silver King demonstrate, in the decade since the Commission abolished commercial limitations, the media marketplace has changed dramatically.[14/] Viewers face a staggering array of viewing

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12/ Id. at 5335 (emphasis in original).

13/ Notice at 2.

14/ While the pre-1984 commercial limitations were fueled by prevailing notions of "spectrum scarcity," the lifting of those limitations was accompanied by and, in large part, contributed to an explosion of new technologies and video services. The number of full power TV stations has increased with the result that more than 50 percent of United States households with television receive ten or more over-the-air signals. Notice at 5. Similarly, the number of radio stations has increased so that listeners have access to a substantial number of radio stations, even in the smallest markets. And the format of these stations ranges from all music to all news-all talk or some variation thereof.

In addition, as then-Judge Kenneth Starr recognized in his concurrence in Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) (Starr, J., concurring), cert. denied, 110 S. Ct. 717 (1990), considerations of the responsiveness of the media marketplace to the public's need for program diversity can no longer be limited to the number of broadcast outlets but, in addition, must include the whole

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and listening options, including channels that offer nothing but sports or news or coverage of congressional or judicial proceedings. Given that we are approaching the First Amendment ideal of a virtually limitless assortment of viewing and listening offerings, it would be anomalous to revert to content regulations "based on the percentage of editorial content compared to advertising material."[15/]

Even if the re-imposition of limits on commercial content might serve some as yet unidentified public interest, the Commission has candidly acknowledged that such re-regulation would have profound constitutional implications. Even regulations that might have been lawful in an earlier constitutional era would face significantly heightened scrutiny under modern First Amendment jurisprudence: "many of the Commission's prior policies on commercialism predated the extension of First Amendment protection to commercial speech."[16/] "[M]ost recently," the Commission noted, "the Supreme Court has cautioned that government regulations should not 'place too much importance

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14/ (...continued)
array of various non-broadcast media, including, among other things, cable and satellite television. 867 F.2d at 685. Today, more than 60 percent of the nation's television households currently subscribe to cable; of those, the average subscriber receives more than 30 channels. Notice at 5. Other competitive video providers are increasingly available, and the Commission anticipates national DBS service next year.

15/ Notice at n.20.

16/ Id.

on the distinction between commercial and noncommercial speech.'"[17] Significantly, the Commission acknowledged that "[a]ny evaluation of the constitutional 'worth' of speech that is based on the percentage of editorial content compared to advertising material is a very suspect proposition."[18] These comments address that suspect proposition.

II. ARGUMENT

Recent Supreme Court Authority Indicates That The Re-Imposition of Commercial Content Regulation Would Not Withstand Constitutional Challenge.

In the absence of any identifiable harm caused by home shopping services, the Commission cannot impose restrictions on the broadcast of such services consistent with the First Amendment. It is beyond dispute that commercial speech does receive substantial protection under the First Amendment because "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."[19]

> The listener's interest [in commercial speech] is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising,

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17/ Id. (quoting City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1514 (1993)).

18/ Id.

19/ Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993).

> though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.[20/]

Though restrictions on commercial speech were historically examined under a somewhat more forgiving First Amendment standard than restrictions on noncommercial speech, recent Supreme Court decisions have effectively eroded any significant legal distinction between the two.[21/] Thus, as the Commission recognized in its Notice, the Supreme Court has admonished regulators not to "place too much importance on the distinction between commercial and noncommercial speech."[22/]

The Court's recent elevation of the status of commercial speech is attributable to its recognition that,

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20/ Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (citations omitted).

21/ Indeed, Justice Blackmun would draw no distinction between "commercial" and "noncommercial" speech:

> The present case demonstrates that there is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech.

Discovery Network, 113 S. Ct. at 1518 (Blackmun, J., concurring).

22/ Discovery Network, 113 S. Ct. at 1514.

in certain situations, the information conveyed by commercial speech is as important as the information conveyed by noncommercial speech. For example, in Discovery Network, the Court concluded that the commercial publications contained in the newsracks at issue in the case, "which [primarily] advertise the availability of residential properties and educational opportunities, are unquestionably 'valuable' to those who choose to read them . . . ."[23/] The Supreme Court went on to hold that the restrictions on newsracks distributing commercial publications but not on newsracks distributing noncommercial publications violated the First Amendment. Similarly, the record in this and in the prior proceeding concerning home shopping services demonstrates that such programming, like the information conveyed by the commercial publications at issue in Discovery Network, is extremely important and valuable to many Americans.[24/] Under such circumstances,

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23/ Discovery Network, 113 S. Ct. at 1518. During the oral argument in the case, Justice Scalia illustrated the significance of commercial speech to the daily lives of Americans when he acknowledged that, for himself and many other citizens, other real estate advertising was "'much more important than the war in Bosnia.'" Linda Greenhouse, Supreme Court Roundup; Justices Examine Limits on Commercial Speech, N.Y. Times, Nov. 10, 1992, at A-19 (quoting statement of Justice Antonin Scalia during oral argument in Discovery Network).

24/ The erosion of the distinction between commercial and noncommercial speech may also be attributable, in part, to the fact that commercial speech, at its edges, has become indistinguishable from noncommercial speech. Thus, the study conducted by Louis Harris and Assocs. Inc. and

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the mere fact that the speech can be characterized as in some sense "commercial" does not diminish the government's burden of justifying the proposed regulation.

The current test to determine whether core commercial speech is entitled to receive First Amendment protection has three parts. Initially, the speech "must concern lawful activity and not be misleading."[25/] Next, the asserted governmental interest in regulating the speech must be substantial;[26/] if it is not, the speech cannot be regulated. Finally, it must be determined whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than is necessary to serve that interest.[27/] In other words, to survive a First Amendment challenge, though the regulation need not be the "least restrictive" method of achieving the government's asserted objective, there must be a "fit":

> [A] "fit" between the legislature's ends and the means chosen to accomplish those ends," -- a fit that is not necessarily perfect, but reasonable; that represents

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24/ (...continued)
submitted with the Comments of Home Shopping Network, Inc. demonstrates that the majority of home shopping viewers watch home shopping programming principally for its entertainment and informational value, and only secondarily to make purchases.

25/ Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980). This test is clearly satisfied here.

26/ Id.

27/ Id.

> not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.[28/]

The Court has on many occasions struck down government regulation of commercial speech.[29/] For example,

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28/ Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989) (citing Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341 (1986); In re R.M.J., 455 U.S. 191, 203 (1982)).

29/ See, e.g., Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990) (attorney has right under standards of commercial speech to advertise his or her certification as a trial specialist by the National Board of Trial Advocacy); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (state may not categorically prohibit lawyers from soliciting legal business by sending truthful and nondeceptive letters to potential clients known to face a particular legal problem); Pacific Gas and Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) (striking down utility commission's order requiring utility to put a third party's newsletter in its billing envelopes); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) (striking down rule against soliciting or accepting legal employment through advertisements containing information and advice regarding a specific legal problem and rule banning use of illustrations in attorney advertisements); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) (federal statute prohibiting the mailing of unsolicited advertisements for contraceptives is an unconstitutional restriction of commercial speech); In re R.M.J., 455 U.S. 191 (restrictions on lawyer advertising prohibiting deviating from precise listing of practice areas specified in an addendum to the rule, identification of jurisdiction in which the lawyer is licensed to practice, and the mailing of announcement cards to persons other than lawyers, clients, former clients, personal friends and relatives violate the First Amendment); Central Hudson Gas & Elec. Corp., 447 U.S. at 557 (striking down regulation completely banning electric utility from advertising to promote use of electricity); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. (continued...)

just last term, the Court struck down a Florida anti-solicitation statute that banned personal and telephone solicitation of clients by certified public accountants ("CPAs") in Edenfield v. Fane.[30/] In an opinion written by Justice Anthony Kennedy, the Court concluded that this regulation did not advance in any direct and material way the state's asserted interests in protecting clients from

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29/ (...continued)
620 (1980) (ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75 percent of receipts for charitable purposes was unconstitutionally overbroad); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (protection extended to corporations in their attempt to influence voting on individual income tax referenda without a showing of a material effect on their business or property); Bates, 433 U.S. at 350 (advertising by attorneys not misleading and therefore it is protected commercial speech); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (prohibition of advertising or display of contraceptives not justified on grounds that ads would be offensive and embarrassing to those exposed to them and permitting such ads would legitimize sexual activity of young people); Linmark Associates, Inc. v. Willingboro Township, 431 U.S. 85 (1977) (ordinance prohibiting posting of "For Sale" or "Sold" signs on residential property not justified by township's perception of flight of white homeowners from racially integrated community); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (ban on advertising prescription drug prices not justified by state's interest in maintaining professionalism of licensed pharmacist; commercial speech protected by First Amendment but may be regulated by time, place and manner restrictions or if false, deceptive or misleading or proposes illegal transaction); Bigelow v. Virginia, 421 U.S. 809 (1975) (paid commercial advertisement in newspaper protected by First Amendment; conviction of newspaper editor for encouraging or prompting an abortion through the sale of a publication overturned).

30/ 113 S. Ct. 1792 (1993).

fraud or invasion of privacy and in maintaining the independence of CPAs.

According to the Court, personal solicitation is clearly commercial expression to which the First Amendment applies. "In denying CPAs and their clients [the] advantages [of solicitation], Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage . . . is designed to safeguard. The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."[31/] While the state's asserted interests were deemed substantial, the Court found that the statute failed to meet the commercial speech test because the state board of accountancy did not demonstrate that its solicitation ban advanced the governmental interests.[32/]

31/ Id. at 1798 (citations omitted).

32/ Id. The Court distinguished its decision in Edenfield, from that in Ohralek v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), in which the Court upheld a ban on in-person lawyer solicitation, on the ground that "[u]nlike a lawyer, a CPA is not 'a professional trained in the art of persuasion.'" Edenfield, 113 S. Ct. at 1802. Thus, even in an area where the potential for harm from speech would appear to be great, such as in-person solicitation, the Court will examine closely the nature of the speech to be regulated and its potential for causing the asserted harm. The differing results in what would appear to be two very similar cases demonstrates that it is not enough that particular speech be labelled "commercial"; the Court will scrutinize the speech carefully to discern whether the speech itself creates a real potential for harm.

On the other hand, cases in which the Supreme Court has upheld restrictions on commercial speech have involved primarily circumstances in which the evils sought to be regulated were not related to the content of the commercial speech as such, but rather either to the underlying commercial transactions promoted by the commercial speech, or to other incidental harms caused by the commercial speech. In Posadas, for example, the government of Puerto Rico was concerned about the social evils caused by casino gambling.[33/] It sought to limit such gambling by its own citizens by prohibiting casino advertising targeting the Puerto Rican population, as opposed to tourists from outside the Commonwealth. Applying the commercial speech standard, the Supreme Court found Puerto Rico's interests "substantial" and its mechanism sufficiently well tailored to vindicate those interests.[34/] Similarly, in Metromedia, Inc. v. City of San Diego, the City of San Diego sought to eliminate commercial billboard

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33/ As described by the Court, the law was based on the legislature's belief that "'[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.'" 478 U.S. at 341.

34/ Id. at 341; see also United States v. Edge Broadcasting, 113 S. Ct. 2696 (1993) (affirming application of federal law prohibiting a radio station in North Carolina, where lotteries are illegal, from broadcasting Virginia lottery advertisements).

advertising not because of the content of what the advertisements said, but because of the "visual clutter" and safety hazards caused by the physical presence of billboards on the landscape.[35/]

Edenfield, Posadas and Metromedia stand for the proposition that if speech is to be restricted because of its commercial character, regulators must identify a real harm arising from the speech and must demonstrate that the proposed restriction will advance materially the elimination of that harm.[36/] The government bears the burden of proving that the commercial speech regulation it has imposed is justified, and that it has crafted its regulation so as to separate "the harmless from the harmful."[37/]

Any proposed limitation on home shopping services would fail the commercial speech test at the threshold: no commercial harm purportedly caused by home shopping services

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35/ 453 U.S. 490, 493 (1981) (identifying the City's interests as the elimination of "'hazards to pedestrians and motorists'" and "'to preserve and improve the appearance of the City.'").

36/ Edenfield, 113 S. Ct. at 1795 ("A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

37/ Board of Trustees, State University of New York, v. Fox, 492 U.S. at 480 ("'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful'") (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 478 (1988)); see also Zauderer, 471 U.S. at 646.

has been identified. As the statements of Congress and Chairman Quello referenced above indicate, the regulatory motivation is simply a disdain for the content of the speech. The home shopping detractors seek to restrict home shopping services because of their paternalistic view that such services have little social utility. However, as the Supreme Court held in Discovery Network, speech cannot be restricted merely because it is of "low value."[38/] Dislike for the content of speech that is lawful and not misleading or fraudulent is an improper interest as a matter of law. The imposition of restrictions on home shopping services based on paternalistic disdain for their program content would be purely content-based discrimination against speech, which is per se unconstitutional.[39/]

Moreover, not only have the home shopping detractors not articulated a substantial interest to be served by imposing restrictions on home shopping services,

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38/ Discovery Network, 113 S. Ct. at 1516.

39/ R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992) ("[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.") (citations omitted); see also Alliance for Community Media v. FCC, No. 93-1169, slip op. at 29 n.19 (D.C. Cir. Nov. 23, 1993) (holding FCC Order regulating indecent programming violative of the First Amendment in part because "there is a much more realistic chance that official suppression of ideas is afoot in this situation, since access programmers tend to be a distinctly alternative voice to the mainstream media").

the Commission found in the must-carry proceeding that "the record reflects no detriment to the public caused by [home shopping] operations."[40/] Indeed, there is ample record evidence that home shopping services provide real benefits to the public.[41/] Thus, even if it were constitutionally permissible to regulate commercial speech based on a perception that such speech is of limited social utility,

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40/ Report and Order, 8 FCC Rcd at 5328. In addition, an exhaustive search of the scientific literature on the effects of advertising has located no studies or research establishing that commercial programming (other than advertisements for dangerous or harmful products such as alcohol and tobacco) is harmful to the public. Cf. M. Holbrook, "Mirror, Mirror, on the Wall, What's Unfair in the Reflections on Advertising?" 51 Journal of Marketing, 95, 102 (July 1987) (emphasizing that there is no empirical evidence that advertising is a socially destructive force).

Anecdotal evidence is insufficient to meet the government's burden of showing harm. For example, in Alliance for Community Media, an indecency case, the D.C. Circuit held that the Commission had not met its burden because it proffered no empirical evidence of harm, offering instead Senator Jesse Helm's statements on the Senate floor invoking anecdotal evidence. Slip op. at 32-33.

41/ In the must-carry proceeding, the Commission expressly found that "home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner." Report and Order, 8 FCC Rcd at 5327. Such people include "the disabled and others confined to their homes, the elderly, families without the time to shop by other means, people without ready access to retail outlets or whose outlets do not stock the goods they want, people without cars or other transportation, people who dislike shopping, and people who are afraid of violent crime in conventional shopping areas." Id. No commenter disputed that home shopping service stations meet the specialized needs of those persons who either lack the time or the ability to obtain goods outside the home or who otherwise benefit from the type of marketing process offered by home shopping services. Id.